D.P.U./D.T.E. 96-AD-6

Adjudicatory hearing in the matter of the complaint of Mario Moruzzi and Mo-Del Landscape, Inc., relative to the rates and charges for gas sold by Commonwealth Gas Company

---

APPEARANCES: Ralph T. Lepore, III, Esq.

Holland & Knight, LLP

18 Tremont Street, Eighth Floor

Boston, MA 02108

FOR: MO-DEL LANDSCAPE, INC.

Complainant

John Cope-Flanagan, Esq.

NStar Services Company

800 Boylston Street

Boston, MA 02199

FOR: COMMONWEALTH GAS COMPANY

Respondent

Roger L. Plante

113 Border Street

Cohasset, MA 02025

PRO SE

Tenant

I. INTRODUCTION

On June 13, 1995, an informal hearing was held before the Consumer Division ("Division") of the Department of Telecommunications and Energy ("Department") on the complaint of Mario Moruzzi, treasurer for Mo-Del Landscape, Incorporated ("Mo-Del"), relative to the rates and charges for gas sold by Commonwealth Gas Company ("ComGas" or "Company").[(1)] Mo-Del was dissatisfied with the informal hearing decision rendered on

May 13, 1996, and requested an adjudicatory hearing before the Department pursuant to

220 C.M.R. § 25.05(4)(c). The matter was docketed as D.P.U./D.T.E. 96-AD-6.

Pursuant to notice duly issued, an adjudicatory hearing was held on October 27, 1998 at the Department's offices in Boston, in conformance with the Department's regulations on Billing and Termination Procedures, 220 C.M.R. §§ 25.00, et. seq.[(2)] Mario Moruzzi, treasurer for Mo-Del, testified on its behalf. ComGas sponsored the testimony of

JoAnne Fredkin, supervisor of customer services for the Company. Roger Plante

("Mr. Plante" or "Tenant"), former tenant of the site in question, testified on his own behalf. The evidentiary record consists of twelve exhibits, of which six were introduced by the Company and six were introduced by Mo-Del.

II. SUMMARY OF ISSUES

Mo-Del disputes a bill issued by the Company in the amount of $1,802.07 for service provided to Mr. Plante, a tenant of Mo-Del during his residence at 54 Main Street,

Apartment 1, Framingham, MA for the period August 16, 1993 through April 6, 1995, as a result of a violation of the State Sanitary Code ("Code"), 105 C.M.R. § 410.354

(Tr. at 7, 16). The citation was issued by the City of Framingham Board of Health ("Board of Health") to Mr. Moruzzi and Mo-Del on March 24, 1995, and indicates that a violation of

of the Code exists because the Tenant's apartment heater also served the common area baseboard heat directly outside of the Tenant's apartment (Exhs. CG-1; CMPL-6). Mo-Del concedes that the common area baseboard heater was connected to the Tenant's meter

(Tr. at 8-10, 20, 21, 24-26), but contends that efforts were made to correct this situation one year prior, and that it should be billed only for the gas attributable to the common area baseboard heater (Exhs. CMPL-2; CMPL-3; CG-6, at 2; Tr. at 10, 20-23, 25, 26, 32-33, 70).

The Company stated that, based on the Department's regulations and precedents, the Company's policy is to rebill the property owner for the tenant's gas usage once a Code violation is established (Tr. at 74).

III. SUMMARY OF FACTS

- Mo-Del Landscaping, Inc.

Mo-Del testified that it owns and rents apartments located at 54 Main Street, Framingham, Massachusetts (Tr. at 16). Mo-Del testified that Mr. Plante moved to

54 Main Street, Apartment 3 in 1990, and moved from Apartment 3 to Apartment 1 in

August 1993 and resided in that apartment until April 1995 (id. at 17, 18, 25-26). Mo-Del contends that the Tenant used gas to cook, heat, and fuel the water heater to the apartment (Exh. CMPL-1; Tr. at 19).

In March 1994, the Tenant contacted Mr. Moruzzi in his capacity as a representative of Mo-Del with questions concerning his gas bill (Tr. at 19). Mo-Del testified that it determined that the gas meter serving the Tenant's apartment was also connected to the common area baseboard heater directly outside of the Tenant's apartment, and arranged for a plumber to fix the problem (id. at 20). Mo-Del states that, on March 15, 1999, it paid $555.00 for the plumber's services and believed that the problem had been resolved (Exh. CMPL-2; Tr. at 21). Mo-Del contends that, shortly thereafter, the Tenant contacted Mo-Del via letter to negotiate an adjustment to his rent to offset any overpayments he may have made to the Company during this period (Exh. CMPL-3). Mo-Del testified that the parties agreed to an amount equivalent to one month's rent, or $550, to satisfy this adjustment (Exh. CG-6, at 2; Tr. at 22, 23).

Mo-Del testified that on March 24, 1995, it received notification from the Board of Health that a Code violation existed, specifically that the common area baseboard heater was connected to the gas meter serving the Tenant's apartment (Exhs. CG-1; CG-3; CMPL-6). Mo-Del stated that it again contacted the plumber and directed him to disconnect the common area baseboard heater from the Tenant's meter (Exh. CG-6, at 3; Tr. at 25). Subsequently, Mo-Del testified, the Board of Health reinspected the premises and confirmed the repair, citing the premises as being in order (Exh. CG-4).

Mo-Del alleges that the baseboard heater was not disconnected from the Tenant's meter in early 1994 because the Tenant asked the plumber not to disconnect the common area baseboard heater from his meter (Exh. CG-6 at 3; Tr. at 26, 70). Mo-Del stated that the reoccurrence of this violation is intentional on the part of the Tenant, who one year later,

notified the Board of Health of the violation (Tr. at 70-73). Furthermore, Mo-Del contends that the $550 release from rent between Mo-Del and the Tenant creates a contract resolving all claims arising from the Code violation (id. at 70).

In addition, Mo-Del contends that even if it were responsible for the Code violation, the Department should distinguish between the portion of the bill attributable to the Tenant's usage and the amount attributable to only the baseboard unit in the first floor common area hallway (Tr. at 32). Mo-Del testified that the amount for the gas improperly used to heat the common area baseboard unit by the Tenant was between three and five dollars a month (id.). Mo-Del based this contention on the fact that the total charge to the apartment over the course of two and a half years was approximately $1,800, divided by twenty-four months, resulting in an approximate per month bill of $80 (id.). Mo-Del testified that, in the month after the disconnect took place, the bill for gas service attributed to the apartment in question was $77.72. Mo-Del subtracted $77 from $80 to arrive at its three dollar estimate (id. at 32-33). Therefore, Mo-Del contends that it should not be liable for the Tenant's entire gas bill for the period in question, but rather, only the portion attributable to the common area baseboard heater (id. at 10, 32-33, 70).

B. Commonwealth Gas Company

On March 24, 1995, the Company received a citation from the Board of Health, reporting that, as a result of a complaint filed by the Tenant, the property was inspected by the Board of Health on March 3, 1995, and that a Code violation was found (Exhs. CG-1;

CMPL-6). The Company stated that it then calculated the usage dating back to August 1993, the date upon which the Tenant took possession of Apartment 1, and having determined that pursuant to 220 C.M.R. § 29.08(1) the violation was not a minor one, rebilled Mo-Del for the Tenant's entire bill (Exh. CG-3; Tr. at 40-41, 74). The Company issued Mo-Del the bill in dispute for $1,802.07 (Exh. CG-2; Tr. at 41).[(3)]

The Company testified that $78 was the average bill for the Tenant's unit prior to the adjustment (Tr. at 48). The Company also testified that the difference in question relative to the baseboard heater in the hallway could be as little of a differential to the Tenant's bill as thirty cents (id. at 49).

C. Tenant

The Tenant denied Mo-Del's accusation that he told the plumber not to correct the hallway unit in question (Tr. at 14, 31, 65, 66). The Tenant contends that he endeavored to resolve the high bill problem with both the Company and Mo-Del and only after Mo-Del failed to fix the situation did he report this violation to the Board of Public Health (Exh. CMPL-3; Tr. at 14).

IV. STANDARD OF REVIEW

The Sanitary Code, 105 C.M.R. § 410.345 provides in part:

(A) The owner shall provide [and pay] for the electricity and gas used in

each dwelling unless

(1) Such gas or electricity is metered through a meter which serves only the dwelling unit, except as allowed by 105 C.M.R. 410.254(B); and

(2) The rental agreement provides for payment by the occupant.

(B) If the owner is required, by 105 C.M.R. 410.000 or by a rental

agreement consistent with 105 C.M.R. 410.000 to pay for the electricity

or gas used in a dwelling unit, then such electricity or gas may be metered through meters which serve more than one dwelling unit.

(C) If the owner is not required to pay for the electricity or gas used in a dwelling unit, then the owner shall install and maintain wiring and piping

so that any such electricity or gas used in the dwelling unit is metered

through meters which serve only such dwelling unit except as allowed by

105 C.M.R. 410.245(B).

It is well settled that the Department has jurisdiction to enforce these provisions of the Code, because no substantive or jurisdictional conflict exists between the Department's authority and the authority of the certifying agency which makes a finding whether a Code violation exists. Fink v. Boston Edison Company, D.P.U. 95-AD-4 (1995) ("Fink"); Folloni v. Eastern Edison Company, D.P.U. 92-AD-45 (1994); Eastern Edison Company v. Prybuszauckas, D.P.U. 84-86-64, at 5 (1985) ("Prybuszauckas"). In determining the party responsible for payment for utility service where a violation of the Code is alleged, the Department will not re-litigate the facts underlying a finding of a Code violation but will accept documentation by a certifying agency as probative evidence of the violation. Cahill v. Boston Edison Company, D.P.U. 88-AD-6, at 5-6 (1990) ("Cahill").

The Department has held that any contractual arrangement between the landlord and the tenant for utility service, i.e., a lease agreement, is superseded by the landlord's warranty that rental units are in compliance with the Code. Cahill at 7; Fink at 6. The Department

has also held that it would be inappropriate to permit a utility to enforce a contract for service against a person who, as a matter of public policy, is without liability. Prybuszauckas at 5; Fink at 6. Prior to September 27, 1994, in the event of a Code violation, the Department did not apportion the tenant's bill between the tenant and the landlord. Fink at 6. On September 27, 1994, the Department adopted regulations entitled "Billing Procedures for Residential Rental Property Owners Cited for Violation of the State Code 105 C.M.R. § 410.345 ro 410.245," which became effective on October 21, 1994. Sanitary Code Rulemaking, D.P.U. 90-280 (1994); 220 C.M.R. § 29.00. These regulations provide, among other things, that in instances of minimal use, as defined by the regulations, property owners will not be responsible for the full cost of electric or gas service provided to the tenant for the retroactive period of the violation of the Code, but will be billed by the company ten dollars per month for the cost of operating those electric or gas appliances, outlets, or other energy consumption sources cited by the certifying agency as wrongfully connected to the meter serving the dwelling unit of the tenant customer for the retroactive period of the Code violation. 220 C.M.R. § 29.08; see D.P.U. 90-280, at 5 (1994). Accordingly, relative to requests to appeal the informal decision of the Department's Consumer Division filed on or after October 21, 1994, the effective date of the above regulation, the Department will apportion the tenant's bill between the tenant and the landlord in instances of minimal use, where appropriate. 220 C.M.R. § 29.08 provides in part:

(1) Minimal Use Violation(s). A Sanitary Code violation(s) pursuant to

105 CMR 410.345 or 105 CMR 410.245 that individually or in the

aggregate includes interior and/or exterior common area illumination

(excluding exterior flood light(s)), smoke, fire, and/or security alarms(s),

door bell(s), cooking range, and common area electrical outlets, provided

that the violation(s) does not also include the wrongful connection to the

meter serving the dwelling unit of the tenant customer of heating, air

conditioning, hot water heating, electrical pump(s), clothes dryer,

refrigerator or freezer.

The time period[(4)] that the property owner is responsible for paying for service previously billed to the tenant resulting from a Code violation is set forth in

220 C.M.R. § 29.07, which states in part:

(1) Time Period. A utility company shall determine the time period of the

property owner's responsibility for paying for service previously billed to the tenant customer resulting from the Sanitary Code violation(s) pursuant to 105 C.M.R. § 410.345 and/or 105 C.M.R. § 410.245 as the lesser of (a), (b) or (c):

(a) By calculating back two (2) years from the effective date of the citation, pursuant to 220 C.M.R. § 29.04(2); or

(b) By referencing back to the date that the tenant customer became customer of record for service to the dwelling unit that is the subject of the violation; or

(c) By reviewing [the] billing history for the dwelling unit that is the subject of the violation over a two (2) year period back from the effective date of the citation, pursuant to 220 C.M.R. § 29.04(2) to determine the approximate date of commencement of the Sanitary Code violation(s).

The precise ending date of the period of the Code violation is governed by 220 C.M.R. § 29.04(3). Specifically, that section states:

- The effective date of correction of the violation(s) set forth in the citation shall be the actual date of reinspection of the dwelling as referenced in the written correction notice issued by the Certifying Agency to the property owner. The property owner shall give such correction notice to the utility company pursuant to 220 C.M.R. § 29.06(3)(e);

- If the actual date of reinspection is not referenced in the correction notice, the effective date of the correction of the violation(s) set forth in the citation, shall be the date that appears on the face of the correction notice issued to the property owner;

- If more than 30 days elapse between the effective date of the correction and the date of notice to the utility company of such correction, the property owner shall be responsible for paying the electric or gas service provided to the tenant customer until the date that the property owner provides a copy of the correction notice to the utility company.

Under 220 C.M.R. § 29.13, the Department may, wherever appropriate, grant an exception to any provisions of 220 C.M.R. § 29.00.

V. ANALYSIS AND FINDINGS

The principal issue in this case is whether Mo-Del is obligated to pay for gas service rendered to the Tenant due to a Code violation. If the Department finds that Mo-Del is responsible for the gas service billed to the Tenant, then the Department must also determine the extent and duration of that responsibility.

The Code clearly provides that the owner of a residential rental building must supply and pay for the gas used in each dwelling unit unless the gas is metered through a meter which serves only the dwelling unit, except as allowed by 105 C.M.R. § 410.245(B). In this case, the Board of Health inspected the premises in question and found that the Tenant's meter was not only measuring gas for the Tenant's apartment, but also was connected to the baseboard heating unit in the first floor common area hallway (Exh. CG-1, at 1). The Department therefore finds that a Code violation did occur during the period in question.

The Department must now determine the extent and duration of Mo-Del's obligation to pay the Tenant's gas bills as a result of the Code violation. First, Mo-Del contends that it should not be liable for the Code violation because the Tenant allegedly told the plumber not to disconnect the common area unit from the Tenant's unit. The Tenant denies the claim made by Mo-Del, and Mo-Del offers no evidence sufficient to prove its accusation. Mo-Del provided a check dated March 15, 1994 in the amount of $555 to Mr. Vernon Matheson, the plumber, as evidence that Mo-Del had contacted the plumber to have the common area heater disconnected from the Tenant's gas meter, but no invoice was provided for the work conducted (Exh. CMPL-2). Moreover, the Tenant wrote two letters to Mo-Del after the repairs were allegedly made in which he states that the system had not been fixed (Exhs. CMPL-3, CMPL-4). Mo-Del provided an invoice, dated April 17, 1995, following the issuance of the Code violation, from the plumber detailing the disconnection of the common area baseboard heater (Exh. CMPL-5). While there is evidence that a plumber came to the site on March 15, 1994, and there is evidence that the Tenant did communicate with the plumber on that day, there is no evidence that the Tenant directed the plumber not to disconnect the common area baseboard heater from the meter providing gas service to his apartment (Exhs. CMPL-2, CMPL-3; Tr. at 31, 65-66). Moreover, the Department does not normally look beyond the existence of a valid citation of a violation.

Second, Mo-Del argues that the Department should absolve Mo-Del of any obligation as a result of the $550 credit granted the Tenant in 1994 (Exhs. CMPL-3, CMPL-4; Tr. at 23). As stated above, the Department has held that the existence of any contractual arrangements between the landlord and the tenant for utility service, i.e., a lease agreement, is superseded by the landlord's warranty that rental units are in compliance with the Code. Cahill at 7;

Fink at 6. Mo-Del's arrangement with the Tenant for the $550 credit is a rental abatement agreed to by the parties, but does not absolve Mo-Del of any obligations to provide utility service under 220 C.M.R. § 29.00 et. seq.

Third, the Department must find that the Company, in its determination of the time period of Mo-Del's responsibility for paying for service previously billed to the Tenant, is in compliance with 220 C.M.R. § 29.07. As the Company testified, it calculated the usage dating back to August 1993, the date upon which the Tenant took possession of Apartment 1. No parties objected to the calculation made by the Company. The Department finds this calculation to be in compliance of 105 C.M.R. § 410.354 and 220 C.M.R. § 29.07.

Lastly, Mo-Del argues that the Tenant's gas bill for the period in question should be apportioned between the amount reflecting gas used by the Tenant and gas used for the baseboard heater in the common area hallway. Mo-Del claims that it should be responsible only for three dollars per month of the Tenant's gas bills during the period in question.

The Company testified that the amount of energy consumed by the common area heater might amount to even less than the $78 estimate supplied by Mo-Del (Tr. at 48-49). No testimony was offered in opposition to these estimates.

Under 220 C.M.R. § 29.08(1), property owners are not responsible for the full cost of electric or gas service provided to the tenant, where the violation is determined to be a minimal use violation. Mo-Del was cited for provision of gas service to a common area baseboard heater from a Tenant's meter, a type of violation that is specifically excluded from the minimal use provision of 220 C.M.R. § 29.08, and thus, the landlord would normally be responsible for the tenant's entire gas bill during the period in question (Exhs. CG-2, CG-3; Tr. at 13-14, 36, 40-41, 74).

It is not the purpose of the Code, however, to unduly penalize an owner of a dwelling or to unduly profit a tenant in a dwelling because of minimal Code violations. See Commonwealth v. Haddad, 368 Mass. 795, 799 (1974)(primary purpose of the Code is to prevent violations); Santana v. Boston Edison Company, D.P.U. 90-21-I (1992); Shimo v. Boston Edison Company, D.P.U. 90-30-I (1992). Under 220 C.M.R. § 29.13, the Department may, wherever appropriate, grant an exception to any provisions of

220 C.M.R. § 29.00. Here, Mo-Del and the Company testified that the violation in question amounts to between $0.30 and $3.00 a month, amounting to $66 of the Tenant's gas bill of $1,802.07.[(5)] The Tenant did not dispute Mo-Del and the Company's testimony.

The Department finds that requiring Mo-Del to pay the Tenant's entire gas bill for the period in question is unfair because it unduly penalizes Mo-Del and unduly profits the Tenant. The Department hereby grants an exception from 220 C.M.R. § 29.00 and finds that the Tenant and Mo-Del must apportion the costs owed the Company for the period in question. Mo-Del shall be held liable for that amount estimated by Mo-Del and the Company as attributable to the metered service provided to the common area baseboard unit, amounting to $66 of the total $1,802.07 bill.

VI. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That Mo-Del Landscaping, Inc., shall pay to Commonwealth Gas Company the amount of sixty-six dollars. This amount shall be paid as a lump sum within thirty days of the issuance of this Order; and it is

FURTHER ORDERED: That Commonwealth Gas Company is directed to re-bill Roger Plante for the remainder of the amount in question, $1,736,07, and that Mr. Plante is responsible for this amount.

By Order of the Department,

_____

James Connelly, Chairman

_____

W. Robert Keating, Commissioner

_____

Paul B. Vasington, Commissioner

_____

Eugene J. Sullivan, Jr., Commissioner

_____

Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. Initially, the Company billed Mr. Moruzzi and Mo-Del for the costs incurred as a result of the violation. The parties have since stipulated, however, that any costs should be borne solely by Mo-Del (Tr. at 8, 42).

2. The Department initially scheduled a hearing for May 13, 1998. This hearing date and a subsequent hearing date of September 16, 1998, were postponed at Mo-Del's request.

3. The Company also argues that the Tenant is entitled to be reimbursed in the amount of payments made less any amounts owed to the Company by Mr. Plante. The Company testified that, in addition to this current dispute, Mr. Plante owes the Company $1,052.51 for other outstanding balances on his account (Tr. at 47).

4. Historically, the specific beginning date of the landlord's responsibility was determined by the policy and practice, as stated in the decision rendered by the Consumer Division, following an investigation pursuant to 220 C.M.R. § 25.02(4)(b). Folloni v. Eastern Edison Company, D.P.U. 92-AD-45, at 10-11 (1994). For example, from January, 1992 to October 22, 1994, if a tenancy is for a period greater than two years, the landlord's

responsibility began at a point two years prior to the date of the notice of the Sanitary Code violation. Prior to January, 1992, if the tenancy began as much as six years prior to the date of the notice of the Sanitary Code violation, a landlord could be held responsible for a period not to exceed six years. Generally, where there was no evidence as to when the Sanitary Code violation commenced, the landlord's responsibility for electric or gas charges in situations of cross-wiring or cross-piping was calculated from the date the Sanitary Code became effective, September 1, 1983, or the date of the inception of the tenancy, whichever was later, and continued until the time the Sanitary Code violation was corrected, subject to certain time limits. See Krell v. Boston Edison, D.P.U. 91-AD-12 (1995); Tibbetts v. Massachusetts Electric Company, D.P.U. 90-AD-20 (1993); Burns v. Massachusetts Electric Company, D.P.U. 85-13-9 (1985).

5. August 1993 through April 1995 represents a twenty-two billing period. At three dollars per month, the total portion of the Tenant's gas bill attributed to the common area baseboard heater would be sixty-six dollars for the twenty-two month period.